TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	13
APPENDIX	

CITATIONS

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 10-11

Boehning v. *Indiana State Employees Association*, 44 L.W. 3275 (Nov. 11, 1975) 11

Hostrop v. *Board of Junior College District No. 515*, (7th Cir. Sept. 24, 1975) (Slip Op. pp. 12-15) 10

Goss v. *Lopez*, 419 U.S. 565 (1975) 11

Green v. *United States*, 376 U.S. 149 (1964) 10

Muscare v. *Quinn*, No. 74-1460 (7th Cir. 1975) 9-10

Quinn v. *Muscare*, No. 75-130, cert. granted, 44 L.W. 3228 (Oct. 14, 1975) 8-9

Silver v. *New York Stock Exchange*, 373 U.S. 341, 365 N. 18 (1963) 10

Constitution and Statutes:

Constitution of the United States:

Fourteenth Amendment 2-13

Civil Rights Act of 1871, 42 U.S.C. § 1983 4

Judicial Code, 28 U.S.C. § 1257(3) 2

Revised Code of Washington:

RCW 28A.58.450 3

RCW 28A.58.460 *et seq.* 3, 5

RCW 28A.58.480 4

RCW 28A.58.515 ..... 4, 5

IN THE

Supreme Court of the United States

October Term, 1975

No.

MELVIN R. MARTIN,

Petitioner,

v.

DAYTON SCHOOL DISTRICT NO. 2, WALLACE M. PAYNE, GERALD HOWARD, GALE DAVIS, PATRICK DONOHUE, DALE RAINWATER, School Board Directors, VICTOR C. ANDERSON, Superintendent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in this case on August 12, 1975.

OPINIONS BELOW

The memorandum opinion of the Superior Court of the State of Washington in and for the County of Columbia, dated April 7, 1972, is not officially reported, but is set forth on pp. 1-2 of the appendix to this petition.[1] The findings of fact and conclusions of law of the Superior Court, dated June 26, 1972, are not officially reported but are set

[1] The appendix to this petition will be referred to herein as "App."

forth at App. 3-6. The decision of the Court of Appeals of the State of Washington, Division III, is reported at 10 Wash. App. 191, 517 P.2d 216 (1973), and is reprinted herein at App. 7-12. The opinion of the Supreme Court of the State of Washington is reported at 85 Wash. 2d 411, 536 P.2d 169 (1975), and is reprinted herein at App. 13-15. The order of the Supreme Court of the State of Washington denying petition for rehearing is reprinted herein at App. 16. The remittitur of the Supreme Court of the State of Washington is reprinted herein at App. 17-18.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was filed on June 5, 1975. Petitioner filed a timely petition for rehearing, which was denied on August 12, 1975. On that same date, a remittitur was issued certifying that the court's opinion "became the final judgment of this Court in the above-entitled case on August 12, 1975." On October 31, 1975, Mr. Justice Douglas signed an order extending the time for filing a petition for writ of certiorari to and including December 10, 1975. The manner in which the federal questions were raised and disposed of by the state courts is fully described in the statement of the case herein. This Court has jurisdiction to review the judgment herein by a writ of certiorari under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment to the Constitution of the United States, a public employee possessing a property interest in continued employment may be suspended from his employment without being afforded a prior opportunity to be heard.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"Sec. 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Melvin R. Martin, has been a teacher in the State of Washington since 1966. He had a contract to teach for the school year 1971-72 with respondent Dayton School District No. 2. On January 10, 1972, in mid-term of petitioner's contract, the Board of Directors of the School District (hereinafter "School Board") decided to dismiss petitioner immediately. On January 11, 1972, petitioner was served with written notice that his employment was terminated immediately for four specified reasons. On that date, his students were assigned to other teachers. Thereafter he was given no other work.

Petitioner had been furnished no prior opportunity to be heard. The School Board's precipitous dismissal violated state law, as the courts below all recognized (App. 1, 7-8, 14), for the pertinent state statute requires that a teacher be afforded notice of proposed action and an opportunity for hearing prior to discharge. RCW 28A.58.450.

On January 19, 1972, petitioner filed suit in the Superior Court of the State of Washington in and for the County of Columbia (Case No. 10366), challenging his summary dismissal as violative of his rights under the state statute and the due process clause of the Fourteenth Amendment to the federal Constitution.[2] With respect to the latter, the complaint alleged that "the action of the Board of Directors

---

[2] In accordance with state practice, the pleading with which petitioner initiated his lawsuit was denominated "Notice of Appeal Pursuant to RCW 28A.58.460 *et seq.* and Complaint for Damages and Other Relief."

of Dayton School District No. 2 on January 10 resulting in the final notice of termination on January 11, 1972 . . . violating plaintiff's rights to timely notice, public hearing, impartial hearing, and constitutes a deprivation of plaintiff's property without due process of law in disregard for the 14th Amendment to the United States Constitution."[3] The complaint further alleged that "plaintiff is entitled to damages and other relief under 42 U.S.C. 1983 and related statutes."[4]

On the night of January 19, 1972, the School Board met again. Recognizing the invalidity of its prior action, the School Board undertook to start over, by issuing the notice of proposed action which should have been its initial act. This second notice was served upon petitioner the following day. Despite this change in the form of the notice, petitioner was not reinstated to his job. His salary was paid through January 31, but was discontinued after that date. (The state statute is silent, and does not forbid the *suspension*—as distinguished from *dismissal*—of a teacher prior to his receipt of a hearing).

Under state law, a teacher receiving a notice of proposed action has three options. He may acquiesce in the action, he may request a hearing before the school board, or "in lieu of requesting a hearing before the board . . . [he] may elect to appeal the action of the board directly to the superior court of the county in which the school district is located. . . ."[5] If he elects the latter course, the matter is "heard *de novo* by the superior court."[6] "The superior court shall determine whether or not there was sufficient cause for the action of the board . . . and shall base its

---

[3] *Id.*, p. 3.

[4] *Id.*, p. 4.

[5] RCW 28A.58.515.

[6] RCW 28A.58.480.

determination solely upon the cause or causes stated in the notice [to] the employee."[7]

Because the school board had prejudged the case by initially acting to dismiss him summarily, petitioner opted for the latter course: on January 28, 1972, he filed a second, separate cause of action in the Superior Court of the State of Washington in and for the County of Columbia (Case No. 10368).[8] His pleading again alleged that the interference with his employment had been accomplished without a prior opportunity for hearing, and thus in violation of his right to due process under the Fourteenth Amendment.[9] Additionally, his pleading raised two state-law grounds.[10] Petitioner's two lawsuits (Nos. 10366 and 10368) were consolidated for consideration.

Petitioner filed motions with the Superior Court seeking a temporary injunction, and a final order, requiring that his salary be continued until such time as he had been afforded procedural due process comporting with the requirements of the Fourteenth Amendment. In support of this relief, petitioner argued that his suspension violated the Fourteenth Amendment, because imposed without affording him a prior opportunity to be heard.

On April 7, 1972, the Superior Court issued a memoran-

---

[7] RCW 28A.58.515.

[8] Notice of Appeal pursuant to RCW 28A.58.460 *et seq.* and Complaint for Damages and other Relief (Case No. 10368).

[9] *Id.*, pp. 4-6.

[10] The State-law grounds were as follows:

1. Petitioner contended that the School Board, having initially acted improperly in purporting to terminate his employment, could not thereafter proceed against him on the same grounds.

2. In the event that the court upheld the propriety of the School Board issuing a second notice, petitioner sought the *de novo* hearing to which state law entitled him on the sufficiency of the grounds for dismissal articulated in the notice.

dum opinion disposing of petitioner's motions. The court declared that the "questions raised by these motions are determinable only after taking testimony and trial on the merits, and the motions are denied," and that the provisions of the state statute "provide an adequate remedy for plaintiff and therefore the injunctive process is not available to him" (App. 1-2). The court did not mention the Fourteenth Amendment in its opinion.

Thereafter, on May 17, 1972, a trial was conducted. This trial constituted the first "hearing" on the grounds for dismissal advanced by the School Board in its notices.

On June 26, 1972, the court issued findings of fact and conclusions of law. The court concluded that "reasonable, sufficient and good cause for discharge has been proved by defendants and plaintiff, Melvin R. Martin, should be discharged as teacher and coach for Dayton School District No. 2" (App. 6). The court made no mention of petitioner's quest for his salary for the period between suspension and decision, and no mention of the Fourteenth Amendment. Five months had elapsed between petitioner's suspension and the decision declaring him discharged.

Petitioner appealed to the Court of Appeals of the State of Washington, Division III. His brief listed ten "assignments of error." Two of these assignments related expressly to the alleged violation of petitioner's Fourteenth Amendment rights.[11]

---

[11] Assignment of Error No. 1 challenged the superior court's refusal to grant petitioner's interim motions for payment of his salary for the period prior to the hearing and decision authorizing dismissal. Petitioner's brief to the Court of Appeals contended that "a teacher should not be deprived of employment opportunities in his profession without due process of law. In this instance, appellant was summarily deprived of his rights contrary to the 5th and 14 Amendments of the United States Constitution . . ." Brief for Appellant, p. 14.

Assignment of Error No. 5 challenged the superior court's ultimate

The Court of Appeals ruled in favor of petitioner on one of the state-law grounds.[12] As this ruling sufficed to afford petitioner all of the relief he sought, the Court of Appeals concluded that "appellant's further assignments of error need not be considered" (App. 12).[13]

The School Board thereupon sought review in the Supreme Court of Washington. Although under state practice all issues were before that court, including those which the Court of Appeals had not reached,[14] the court addressed

---

failure to award petitioner his salary for the period between suspension and the post-hearing decision. In support of this contention, petitioner cited a number of federal court decisions holding that due process must be furnished prior to interference with a protected employment relationship. *Id.* pp. 57-64. Petitioner argued that his suspension constituted "adverse action" which "adversely affected" his protected interests, and thus that he was entitled to a *prior* opportunity to be heard. *Id.* p. 64.

[12] The court held that, as the initial "dismissal" was in violation of the state statute, the School Board was precluded from thereafter proceeding against petitioner on the same grounds by a second notice (App. 9-12).

[13] The School Board filed a petition for rehearing in the Court of Appeals which was denied.

[14] Petitioner specifically moved to bring before the state Supreme Court the additional issues (including the federal constitutional claim) which the Court of Appeals had not reached. The following order was entered in response to petitioner's motion:

> "Motion to Amend Answer to Petition for Review
> "March 25, 1974
> "Denied for the reason that the assignments of error contained in [petitioner's] brief filed in the Court of Appeals will be before the Court.
>
> "/s/ Frank Hale
> Chief Justice."

The practice before the Supreme Court of Washington is that the briefs filed in the Court of Appeals become the parties' main briefs in the Supreme Court as well, although each party is afforded an opportunity to file a supplemental brief. Thus, as the above-quoted order indicates, the Supreme Court of Washington had all issues before it, fully briefed, when it rendered its decision.

only the issue which the Court of Appeals had decided, and on that issue it reversed:

> "The sole issue is whether a legally defective notice of discharge may be superseded by a legally adequate notice after the initial notice has been appealed. Within the narrow confines of the facts of this case, we hold that it may." (App. 13).

Nevertheless, the court's decision concluded with the statement: "The judgment of the trial court is affirmed" (App. 15). The effect of this disposition was to pretermit further consideration of petitioner's federal constitutional claim in the state courts.

Petitioner filed a timely petition for rehearing,[15] pointing out that the state Supreme Court had "failed to consider other assignments of error," among them petitioner's federal constitutional claim,[16] and that its disposition precluded petitioner from securing a ruling on that claim in any state court. The petition requested that the state Supreme Court either reach and decide the other issues or, in the alternative, remand them to the Court of Appeals for initial resolution by that Court.[17]

On August 12, 1975 the state Supreme Court issued an order denying the petition for rehearing "by a vote of seven to one" (App. 16). Thus, petitioner had exhausted his opportunities to secure vindication of his federal claim in the state courts.

REASONS FOR GRANTING THE WRIT

This case presents an issue of great legal and practical signficance, which is also before the Court in *Quinn* v.

---

[15] Petition for Rehearing, Modification, or Alternatively, Writ of Mandamus to Court of Appeals, Division III.

[16] *Id.* pp. 9, 10.

[17] *Id.* p. 11.

Muscare, No. 75-130, cert granted, 44 L.W. 3228 (Oct. 14, 1975). In *Quinn,* the Seventh Circuit held that a public employee possessing a property interest in continued employment may not be suspended without a prior opportunity to be heard. The plaintiff in *Quinn* was a fireman who was suspended for 29 days for alleged violations of regulations of the Chicago Fire Department. Under state law, he was entitled to no hearing prior to suspension, but was "entitled upon request to a hearing before the Civil Service Commission" following the imposition of the suspension. The Seventh Circuit rejected a contention that the availability of a post-suspension hearing satisfied the requirements of the Fourteenth Amendment. The Court declared that "due process requires at the minimum that [public employees facing temporary suspension for less than 30 days] be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency." *Muscare* v. *Quinn,* No. 74-1460 (7th Cir. 1975), Slip Op. at 7. The Court found it unnecessary to decide whether such employees are entitled to a full adversarial hearing, for "no hearing of any kind was accorded appellant prior to his suspension." *Ibid.*

In the instant case, as in *Quinn,* petitioner indisputably had a "property" interest—he had a contract to teach for the duration of the 1971-72 school year. Yet he was suspended on January 11, 1972, and his pay was stopped after January 31, 1972, although he had been afforded no opportunity to be heard prior to those actions. Petitioner was not furnished a hearing until May 17, 1972, and did not receive a decision on the propriety of the actions taken against him until June 26, 1972. During the intervening months, petitioner suffered a loss of both employment and income. Although petitioner asserted at every level of the state court proceedings that the failure to afford him an opportunity to be heard prior to suspension violated his

Fourteenth Amendment rights, the Supreme Court of Washington affirmed the rejection of his claim. This disposition directly conflicts with that of the Seventh Circuit in *Quinn,* and warrants consideration of the instant case together with *Quinn.*[18]

At the root of the controversy is an issue discussed, but not definitively decided, in *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). In *Arnett,* six justices adressed the question of what procedural safeguards the Fourteenth Amendment extends to a public employee possessing a property interest in continued employment prior to his removal from employment.[19] Three justices were of the view that such an employee must be afforded a full adversarial hearing prior to removal. 416 U.S. at 212-227 (opinion of Justice Marshall, joined by Justices Douglas and Brennan). A fourth justice was of the view that substantial procedures must be afforded

---

[18] In *Quinn,* the court found that the denial of timely hearing was actionable irrespective of the sufficiency of the substantive grounds for suspension (Slip Op. p. 3). In a subsequent decision, the Seventh Circuit has held that a public employee removed without timely due process is entitled to damages for the unconstitutional denial, notwithstanding that a subsequent hearing establishes that there *were* adequate substantive grounds for removal. *Hostrop* v. *Board of Junior College District No. 515,* No. 74-1915 (7th Cir. Sept. 24, 1975) (Slip Op. pp. 12-15). See also *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 365 n. 18 (1963); *Greene* v. *United States,* 376 U.S. 149, 162 (1964).

[19] The remaining three justices had no occasion to address this question, as they would have predicated the decision upon a ground—disapproved by the other six justices—which pretermitted consideration of the procedural safeguards afforded by the Fourteenth Amendment. In the view of these three justices, where the statute creating a property interest also prescribes a procedure for vindication of that interest, constitutional protection does not extend beyond the statutorily-prescribed procedure. 416 U.S. at 148-155 (opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart). This view was expressly disapproved by the other six justices. 416 U.S. at 166-167 (opinion of Justice Powell, joined by Justice Blackmun); 416 U.S. at 177-186 (opinion of Justice White); 416 U.S. at 209-211 (opinion of Justice Marshall, joined by Justices Douglas and Brennan).

prior to removal, albeit perhaps something less than a full adversarial hearing. 416 U.S. at 186-203 (opinion of Justice White). The other two justices addressing this question declared "that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests" 416 U.S. at 171 (opinion of Justice Powell, joined by Justice Blackmun). Under the statute in *Arnett,* an affected employee received 30 days advance written notice, and, prior to removal, could respond to the charges both orally and in writing, submit affidavits, and appear personally before the official having the authority to make or recommend the final decision. These two justices concluded that "these procedures minimize the risk of error in the initial removal decision." 416 U.S. at 170. It is not clear, however, from the opinion of these two justices, whether they would deem a statutory scheme constitutionally sufficient if it afforded lesser pre-removal procedures, or indeed none at all.[20]

In *Goss* v. *Lopez,* 419 U.S. 565 (1975), this Court held that *students* confronted with suspensions of ten days or less are entitled to notice and hearing, and that "as a general rule notice and hearing should precede removal of the student from school." *Id.* at 582. The Court noted that there were "recurring situations in which prior notice and hearing cannot be insisted upon" i.e., those involving students "whose presence poses a continuing danger to persons or property or an on-going threat of disrupting the academic process". *Id.* at 582. "In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . ." *Id.* at 582-583.

In the instant case, petitioner was afforded no opportunity of any kind to be heard prior to suspension. School

---

[20] See, the footnote in *Boehning* v. *Indiana State Employees Association,* 44 L.W. 3275 (Nov. 11, 1975).

authorities made no contention, or effort to prove, that petitioner's continued presence in the classroom so jeopardized educational interests as to excuse the failure to afford a prior hearing.[21] Nor, of course, could school authorities possibly have proved that the continuance of petitioner's salary pending a hearing would jeopardize any school interest. Moreover, the procedures afforded petitioner did not in any event provide him a hearing promptly following suspension. Thus, unless the Constitution requires absolutely *no* procedural safeguards prior to the suspension of a public employee possesing a property interest in continued employment, petitioner's suspension violated his Fourteenth Amendment rights and the court below erred in rejecting his claim.

---

[21] The grounds for proposed dismissal are recited in the superior court's opinion (App. 4-5). The only ground at all provocative is the fourth. The undisputed evidence at trial showed that petitioner was legally separated from his wife, and under Washington law was free to date other women; that on a trip to a school basketball game he was accompanied on the school bus by his fiancee; that they sat together; and that he had his arm around her and kissed her on the forehead during the trip.

CONCLUSION

For the reasons set forth hereinabove, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

MICHAEL H. GOTTESMAN
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

JUDITH LONNQUIST
3321 N.E. 185th Street
Seattle, Washington 98155

JOHN S. BIGGS
407 Drumheller Building
Walla Walla, Washington 99362

Attorneys for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COLUMBIA

No. 10368
Memorandum Opinion

MELVIN R. MARTIN,

Plaintiff,

v.

DAYTON SCHOOL DISTRICT No. 2, et al.,

Defendants.

For the purposes of this opinion, Causes No. 10366 and No. 10368, involving the same parties, are considered together.

SUMMARY JUDGMENT

Plaintiff's motions for summary judgment in both causes are so intertied that the Court is compelled to examine both in reaching a determination.

There is no question that the first notice of dismissal, based on defendants' actions taken on January 10, 1972, were based on improper procedure and were the defendants to stand on that notice, the plaintiff would be entitled to his summary judgment. The question then arises whether the defendants' actions taken on January 19, 1972, were proper and may be substituted for the prior erroneous proceedings. I believe that the answer must be in the affirmative.

I find no authority for the proposition that defendants could not, before a judicial determination of the effect of their actions taken on January 10, 1972, retrace their actions and correct the jurisdictional error as was done in the action culminating in the notice of January 19, 1972.

The case of Foster v. Carson School District, 63 Wn 2d 29, cited by plaintiff is not apposite. In that case the school board stood on the proceedings which appear to be similar to those taken here on January 10, 1972. No attempt appears to have been made to correct erroneous action as was done here.

I consider that the later action taken by defendants here, is analogous to the taking of a voluntary non-suit because of jurisdictional failure and reinstituting a suit with proper service of process.

The other matters raised by plaintiff in his motions for summary judgment should be determined upon trial on the merits.

Summary judgment is denied.

MOTIONS FOR ORDER TO PAY WAGES AND SUMMER EARNINGS

The questions raised by these motions are determinable only after taking testimony and trial on the merits, and the motions are denied.

MOTION FOR TEMPORARY INJUNCTION

The provisions of the teachers' tenure act, RCW 28A.58.450 et seq. provide an adequate remedy for plaintiff and therefore the injunctive process is not available to him. The motion is denied.

Dated the 7th day of April, 1972.

/s/ Patrick McCabe
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COLUMBIA

Nos. 10366 and 10368
Findings of Fact
and
Conclusions of Law

MELVIN R. MARTIN,

Plaintiff,

v.

DAYTON SCHOOL DISTRICT NO. 2, WALLACE M. PAYNE, GERALD HOWARD, GALE DAVIS, PATRICK DONOHUE, DAYLE RAINWATER, School Board Directors; VICTOR C. ANDERSON, Superintendent,

Defendants.

This matter came on to be heard on May 17, 1972, for hearing as provided under the provisions of RCW 28A.58.515.

Plaintiff appeared in person and by his attorney, John S. Biggs; the defendants appeared by the directors and Victor C. Anderson, Superintendent of Schools, and by their attorneys, H. N. Woolson as Prosecuting Attorney for Columbia County, Washington, and Albert Golden.

The purpose of the hearing was to hear evidence and determine whether there was a preponderance of the evidence to substantiate charges one through five made against plaintiff by the Directors of Dayton School District No. 2 in their notice to him of January 20, 1972.

The parties were sworn and testified. Other evidence, oral and documentary, was received.

FINDINGS OF FACT

On the basis of said evidence, the Court finds as follows:

I.

This Court has jurisdiction to hear this matter as provided in RCW 28A.58.515.

II.

Notice of discharge was given by the Board of Directors of Dayton School District No. 2 on January 11, 1972, without notice of hearing as required by RCW 28A.58.450. After a meeting of the Board held on January 19, 1972, and on January 20, 1972, notice of hearing as so required was given to plaintiff by the Board. Plaintiff gave notice of appeal directly to the Superior Court on the 19th day of January, 1972, from the action taken by the Board on January 11, 1972, in Columbia County Cause No. 10366, and on January 28, 1972, from the action taken by the Board on January 20, 1972, in Columbia County Cause No. 10368.

III.

Charges stated in the notice of January 20, 1972, as follows:

Charge One: That plaintiff held basketball practices in excess of 1¾ hours in length contrary to published school policy. This charge is not proved unless the seventh period of classes is considered a part of basketball practice. The Court does not so find but does find the plaintiff was advised by his principal that said seventh period was to be counted as a part of basketball practice and that plaintff refused to agree.

Charge Two: That plaintiff allowed two boys to use the high school gymnasium in violation of school policy. Plaintiff did allow several boys to do so on one occasion.

Charge Three: That plaintiff allowed a student to leave his class without proper authority. Plaintiff did so on one occasion.

Charge Four: That plaintiff constantly kissed and caressed a young woman, not his wife, on a school bus before students, and at a basketball game at Kiona-Benton. Plaintiff, a married man though separated from his wife, was accompanied by a young woman on a school bus on a trip from Dayton to Kiona-Benton, the school bus being occupied by the basketball team and girl scorekeepers on an official trip to a basketball game, in the charge of plaintiff. On this trip, while occupying a front seat, the plaintiff kissed and caressed the young woman.

Charge Five: That plaintiff, in violation of a specific directive from the Superintendent of Schools, penalized four boys for failure to turn out for basketball practice during Christmas vacation. Four boys were refused permission to accompany the team to Kiona-Benton on December 30, 1971, because they had missed basketball practice during vacation without having first cleared their action with plaintiff or his assistants.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

I.

The action taken by the Board on January 10, 1972, was void for lack of proper notice. The action taken by the Board on January 19, 1972, and the notice thereof given to plaintiff on January 20, 1972, were valid. Causes No. 10366 and No. 10368 are properly consolidated for trial.

II.

Of the five charges contained in the notice of January 20, 1972, two, three and four constitute sufficient reason for discharge of plaintiff. The element of refusal to accept direction from his administrators in charges one and five

add to the force of the other charges. Reasonable, sufficient and good cause for discharge has been proved by defendants and plaintiff, Melvin R. Martin, should be discharged as teacher and coach for Dayton School District No. 2.

Dated the 26th day of June, 1972.

/s/ Patrick McCabe
Judge

MELVIN R. MARTIN,

Appellant,

v.

DAYTON SCHOOL DISTRICT No. 2, et al.,

Respondents.

No. 686-111.

Court of Appeals of Washington,
Division 3.
Dec. 17, 1973.

Rehearing Denied Feb. 4, 1974.

John S. Biggs of Reese & Mitchell, Walla Walla, for appellant.

Albert J. Golden, Walla Walla, H. N. Woolson, Dayton, for respondents.

EVANS, Judge.*

This is an appeal from a judgment of the Superior Court of Columbia County, upholding the board of directors of Dayton School District No. 2 in its dismissal of appellant for cause.

On June 16, 1971 appellant Melvin Martin entered into a teaching and coaching contract with respondent Dayton School District No. 2. He served as an industrial arts and physical education instructor in addition to his duties as head coach of the Dayton High School basketball program. On January 11, 1972 appellant was served with a notice of discharge, which the school board was later advised by the prosecuting attorney was insufficient in that it did not notify appellant of his right to a hearing before discharge as required by RCW 28A.58.450. Furthermore, it was not

* Judge Hugh E. Evans is serving as a judge pro tempore of the Court of Appeals, pursuant to Laws of 1973, ch. 114.

couched in terms of probable cause, but instead was an unequivocal statement of immediate termination, and the decision to dismiss appellant was made at a closed executive session of the respondent school board, which appellant was not permitted to attend. On January 19, 1972 appellant filed and served notice of appeal to the superior court, under RCW 28A.58.515.

That same evening, January 19, in an effort to correct the deficiencies of the previous notice, respondent prepared a notice of hearing, in accordance with the provisions of RCW 28A.58.450. This notice was served upon appellant January 20 and alleged the following grounds for dismissal: (1) appellant, on several occasions, held basketball practices in excess of the 1¾ hour maximum specified in the school athletic policy; (2) appellant allowed two students tc use the school gym after being advised by written directive and orally that this act violated school policy; (3) appellant, on November 2, 1971, gave permission to a student to leave his class without clearing through the school office, in violation of school policy; (4) appellant (whose divorce was pending) on December 30, 1971 took a young woman, not his wife, with him on the basketball team bus traveling to Kiona-Benton for a game, and appellant's conduct was highly improper in that he constantly caressed and kissed this young woman on the trip and at the game. The above charges are identical to the grounds for dismissal set forth in the first notice. Included in the second notice, however, the following was added; (5) appellant violated a specific directive when he did not allow four team members who missed basketball practice during the Christmas vacation to travel with the team tc the school's next game.

Appellant also appealed respondent's second notice directly to the superior court. The appeals were consolidated and the matter was heard May 17, 1972. The court held, as a matter of law, that the notice of dismissal served upon appellant January 11, 1972 was defective, but that the no-

tice served upon him on January 20 was valid. The court found that grounds for dismissal 2, 3 and 4 contained in the notice were proven by a preponderance of the evidence and constituted sufficient grounds for appellant's discharge.

Appellant contends the trial court erred in that (1) respondent's actions of January 20, 1972 were void since appellant had filed notice of appeal to superior court from the respondent's action of January 11, 1972, and thus respondent had no further jurisdiction to act; and (2) RCW 28A.58.450 precluded appellant's dismissal for the same causes set forth in the defective notice of January 11, 1972 for the remainder of appellant's contract term.

In support of the trial court's decision respondent argues (1) that the school board's action of January 11, 1972 was completely null and void due to the defective notice; therefore the discharge of appellant by service of the proper notice of January 20, 1972 was in all respects legally sufficient; and (2) appellant's appeal under RCW 28A.58.515 cured any failure on the part of the board to provide opportunity for hearing, since RCW 28A.58.515 allows direct appeal to superior court in lieu of a hearing before the board. We cannot agree.

In Foster v. Carson School Dist. 301, 63 Wash.2d 29, 385 P.2d 367 (1963), the teacher had similarly been discharged without an opportunity for a hearing. The statute then in effect (RCW 28.58.450) provided:

> Any decision to discharge such employee shall be based solely upon the cause for discharge specified in the notice of probable cause to the employee and established by a preponderance of the evidence at the hearing to be sufficient cause for discharge.
>
> In the event such notice and opportunity for hearing is not timely given by the district, or in the event cause for discharge is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged for the duration of his or her contract.

In interpreting this statute the court in *Foster* stated at page 32, 385 P.2d at page 369:

> The statute is clear and unambiguous. If a board attempts to discharge a teacher without giving him notice of its finding of probable cause and an opportunity to request a hearing ten days before his discharge becomes effective, "such employee shall not be discharged for the duration of his or her contract."
>
> . . . . . .
>
> [T]he statute (RCW 28.58.450) directs that, because of the lack of notice *and* opportunity for hearing, the teacher shall not be discharged for the remainder of his term. The only function of the superior court, in such a case, once it has determined that the notice was not timely given, is to order the payment of the appropriate damages.

The above statute, as amended and codified as RCW 28A.58.450, now reads:

> Any decision to discharge or to take other adverse action against such employee shall be based solely upon the cause or causes for discharge specified in the notice of probable cause to the employee and established by a preponderance of the evidence at the hearing to be sufficient cause or causes for discharge or other adverse action against his contract status.
>
> In the event any such notice or opportunity for hearing is not timely given by the district, or in the event cause for discharge or other adverse action is not established by a preponderance of the evidence at the hearing, such employee shall not be discharged or otherwise adversely affected in his contract status for the causes stated in the original notice for the duration of his or her contract.

The provisions of RCW 28.58.450 and RCW 28A.58.450,

as above quoted are not significantly different; the reasoning in *Foster* applies here with equal force, and controls. Respondent attempted to discharge appellant without giving him notice of its finding of probable cause and an opportunity to request a hearing. This was clearly contrary to the above quoted portion of RCW 28A.58.450, and the only function of the superior court in the present case, once it was determined that the notice of hearing was not given, was to order payment of the appropriate damages.

We cannot agree with respondent's contention that its actions of January 11, 1972 discharging appellant, were a complete nullity and therefore the later notice of January 20, 1972 granting appellant an opportunity for a hearing was legally sufficient to support the discharge of appellant. Once appellant had filed the notice of appeal in superior court respondent no longer retained jurisdiction to act in making either substantial or technical changes in its decision. The rule is best stated in Fischback Moore of Alaska, Inc. v. Lynn, 407 P.2d 174 (Alaska 1965), at page 176:

> It is the general rule that when an order of an administrative agency is appealed to a court, the agency's power and authority in relation to the matter is suspended as to questions raised by the appeal. The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court's jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

(Footnote omitted.) Appellate jurisdiction over the subject matter of the appeal must be complete, and the actions of respondent board after the initial notice of appeal was filed were void for lack of jurisdiction.

As to respondent's argument that appellant took his appeal to the superior court under RCW 28A.58.515[1], which provides for a direct appeal to the superior court in lieu of a board hearing, and that this cured any defects in the first notice, we cannot agree. This argument overlooks the fundamental failure of respondent to give appellant even an opportunity for a hearing before discharge. Its failure to do so was in no way cured by the fact that appellant appealed to superior court under 28A.58.515.

Due to the decision reached, appellant's further assignments of error need not be considered.

The judgment is reversed and the cause remanded, with directions to assess appellant's damages.

GREEN, C. J., and MUNSON, J., concur.

---

[1] "28A.58.515 *Direct judicial appeals in lieu of board hearings provided in RCW 28A.58.450 and 28A.67.070.* In lieu of requesting a hearing before the board of directors pursuant to the provisions of RCW 28A.58.450 and 28A.67.070, an employee may elect to appeal the action of the board directly to the superior court of the county in which the school district is located by serving upon the clerk of the school board and filing with the clerk of the superior court a notice of appeal within ten days after receiving the notification of the action of the board. The notice of appeal shall set forth in a clear and concise manner the action appealed from. The superior court shall determine whether or not there was sufficient cause for the action of the board of directors and shall base its determination solely upon the cause or causes stated in the notice of the employee. The appeal provided in this section shall be conducted in the same manner as appeals provided in RCW 28A.58.470 through 28A.58.500."

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 43152
EN BANC

MELVIN R. MARTIN,

Respondent,

v.

DAYTON SCHOOL DISTRICT NO. 2, WALLACE M. PAYNE, GERALD HOWARD, GALE DAVIS, PATRICK DONOHUE, DAYLE RAINWATER, School Board Directors; VICTOR C. ANDERSON, Superintendent,

Petitioners.

Brachtenbach, J.—Defendant school district issued to plaintiff school teacher a notice of discharge which was legally defective for reasons mentioned later. The district, on the same day that the plaintiff appealed that notice to the superior court, issued a second, legally adequate notice which plaintiff also appealed. The trial court upheld plaintiff's discharge. The Court of Appeals reversed and ordered plaintiff reinstated. *Martin* v. *Dayton School District 2,* 10 Wn. App. 191, 517 P.2d 216 (1973). We reverse the Court of Appeals and affirm the trial court.

The sole issue is whether a legally defective notice of discharge may be superseded by a legally adequate notice after the initial notice has been appealed. Within the narrow confines of the facts of this case, we hold that it may.

The duties of plaintiff teacher included coaching the high school basketball team. The school administration determined that plaintiff's conduct as coach violated the district's written policies. Discussion between plaintiff and the district superintendent failed to resolve the matter and

plaintiff teacher was told that a discharge notice would be issued. A written notice was served upon plaintiff. It was legally defective because it stated the school board's decision to terminate—as a fait accompli—rather than a notice of probable cause for discharge as required by RCW 28A.58.450. The notice stated four reasons for the district's action.

Plaintiff, under RCW 28A.58.515, appealed to the superior court. On the same day that such notice was filed, the district issued a second notice, containing the four same grounds for its decision plus an additional cause. The trial court found that three of the allegations, contained in both notices, were legally sufficient to justify discharge.

Plaintiff teacher also appealed the second notice and the two appeals were consolidated upon plaintiff's motion. Thus plaintiff was given a hearing on the merits of both notices and, upon three grounds common to both, he lost on the merits of his case.

The legislative direction of RCW 28A.58.450 is remarkably clear. The school district must notify a teacher that the district, through its board of directors, has decided that it has probable cause to discharge or otherwise adversely change the teacher's contract status. The notice must specify the cause or causes. It need do no more, but it must reflect a decision of probable cause, not a judgmental conclusion that the board's mind is closed.

Having defectively framed its first notice, is the school district precluded from corrective action? The contention is that the appeal of the first notice to the superior court divested the school board of all jurisdiction including necessarily the right to issue a legally sufficient notice.

It is the general rule that the jurisdiction of an administrative agency over a particular matter ends when its decision is appealed to the court. The reason is that the court's

jurisdiction "must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body." *Fischback & Moore of Alaska, Inc.* v. *Lynn,* 407 P.2d 174, 176 (Alaska 1965). A mechanical application of that principle would deny the board's ability to reissue a notice, but consideration of the underlying rationale for the rule precludes its control here. For, looking at our facts, we find that the school board took two official actions. It had issued a defective notice and 9 days later issued a legally sufficient notice. What was the judicial involvement at that time? Virtually none. When the district issued the second notice the invocation of the court's powers was limited to the court clerk's act of receiving a notice of appeal.

We hold that such minimal judicial contact did not oust the school board from its legal ability to issue a proper notice to plaintiff. In so holding we emphasize that the court had taken no action, that plaintiff was in no way prejudiced and that the board gained no advantage by its actions.

The plaintiff teacher asked the superior court to review the causes for his discharge. The court did so and plaintiff lost. The situation is similar to that in *Pierce* v. *Lake Stevens School Dist. 4,* 84 Wn.2d 772, 782, 529 P.2d 810 (1974), where we emphasized that the appellant teachers had availed themselves of a de novo hearing before the superior court where they had an opportunity to demonstrate, if they could, that there was no probable cause. Thus the form of the notice in that case, like in this one, did not prejudice the appellants nor deprive them of any rights.

The judgment of the trial court is affirmed.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 43152

MELVIN R. MARTIN,

Respondent,

vs.

DAYTON SCHOOL DISTRICT No. 2, et al,

Petitioners.

ORDER DENYING PETITION FOR REHEARING

The Court having decided by a vote of seven to one that the respondent's petition for rehearing should be denied.

It is ordered that the petition be and it hereby is denied.

Dated this 17th day of August, 1975.

/s/ Charles F. Stafford
Chief Justice

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REMITTITUR
No. 43152
Columbia County No. 10366

MELVIN R. MARTIN,

Respondent,

v.

DAYTON SCHOOL DISTRICT NO. 2, WALLACE M. PAYNE, GERALD HOWARD, GALE DAVIS, PATRICK DONOHUE, DAYLE RAINWATER, School Board Directors; VICTOR C. ANDERSON, Superintendent,

Petitioners.

The State of Washington to:

The Superior Court of the State of Washington
in and for Columbia County

This is to certify that the opinion of the Supereme Court of the State of Washington filed on June 5, 1975, became the final judgment of this court in the above entitled case on August 12, 1975. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

One hundred ninety eight and 57/100 dollars ($198.57) in favor of petitioners and against respondent

Petition for rehearing was denied by order dated August 12, 1975.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 12th day of August, A. D. 1975.

/s/ William M. Lowry
Clerk of the Supreme Court,
State of Washington.